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GOING THE LAST MILE IN REFORMING THE COURTS-MARTIAL SYSTEM: REMOVING THE CONVENING AUTHORITY FROM THE PANEL SELECTION PROCESS

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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United States Army

35TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1987

GOING THE LAST MILE IN REFORMING THE COURTS-MARTIAL SYSTEM: REMOVING THE CONVENING AUTHORITY FROM THE PANEL SELECTION PROCESS

by CPT George Baker Thomson, Jr.

ABSTRACT: This thesis examines the court-martial panel selection process in the military. This process, which does not extend sixth amendment jury trial rights to soldiers, has historically been tolerated because of the limited criminal jurisdiction the military exercises. Recent expansions of military subject matter jurisdiction have raised due process questions concerning the methods of panel selection. This thesis concludes, in the light of these jurisdictional expansions, that due process and fairness considerations demand a random panel selection method be instituted in the armed forces.

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"Ye shall do no unrighteousness in judgment..." Leviticus 19:35

"Abstain from all appearance of evil." 1 Thessalonians 5:22

I. INTRODUCTION

Civilian criticism of the military criminal justice system has resulted in a continuing series of procedural reforms designed to bring military practice into line with civilian due process standards. The evolution of law officers into military judges, the creation of Boards of Review and their ascendence to appellate courts, the establishment of the Court of Military Appeals, and the creation of the Trial Defense Service can all be characterized as responses, in part, to perceptions of unfairness in the military justice system by civilians and soldiers alike. The civilianization of the court-martial process is nearly complete; however, a few vestiges of the traditional court-martial process remain. Primary among these is the method of court-martial panel selection used by the armed forces.The purpose of this article is to examine the current procedures used in selecting court members and to advocate that the logical conclusion to the legislative decision to civilianize courts-martial is to remove the court-martial convening authority

from the panel selection process and substitute a random selection method.

Juries have always been the subject of intense debate. Two literary luminaries have advanced divergent views of the institution. Mark Twain said: "The jury system puts a ban on intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because it was good a thousand years ago."[1] G.K. Chesterton felt differently:

> "Our civilization has decided, and very justly decided that determining the guilt or innocence of men is a thing too important to be trusted to trained men. If it wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things I felt in a jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done that is really serious, it collects twelve of the ordinary men standing about. The same thing was done, if I remember right, by the Founder of Christianity."[2]

Although the military panel member is not a juror in the strict legal sense, he shares the same responsibility to find facts, decide guilt or innocence, apply community standards, and use his experience and common sense to carry out those duties.

II. LEGAL AND HISTORICAL BASES OF JURISDICTION

A. LEGAL BASIS

The legal basis for the present military justice system begins with three constitutional pronouncements found in Article I, section 8; Article II, section 2; and the Fifth Amendment, respectively:

> "The Congress shall have power to make rules for the government and regulation of the land and naval forces;"[3]

> "The President shall be Commander in Chief of the Army and Navy of the United States and of the militia of the several States, when called into the actual service of the United States;"[4]

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger;"[5]

The statutory source of the military justice system is the Uniform Code of Military Justice (hereinafter UCMJ) which is codified in Title 10 of the United States Code.[6] This article focuses on the application of Article 25 of the UCMJ to courts-martial and the court-martial panel selection process set out in subsection (d)(2) of that article.[7] In pertinent part, Article 25 mandates that the convening authority "[S]hall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[8]

Clearly, courts-martial panel members are not selected by the same standard as civilian jurors. Civilian jury trials are a right so fundamental that the Fourteenth Amendment has been held to extend the guarantee to all cases in the states which, if tried in federal court, would come within Sixth Amendment jury trial requirements.[9] The Supreme Court later clarified this to require a jury trial for all offenses which carried a potential sentence of more than six months in prison.[10] Judge Walter Jordan

synopsizes the civilian standard by saying that "A jury trial in either civil or criminal proceedings contemplates, and if justice is to be served demands, a totally fair and impartial group of citizens picked from the community, completely at random."[11] The United States Supreme Court's standard for civilian juries is that they be selected from community cross sections, without systematic and intentional exclusion of any group for reasons of race, national origin, sex, religion, economic status, political belief, social standing, or geographic location.[12] In sum, the jury should be "truly representative of the community."[13] The American Bar Association Standards Relating to Trial by Jury echo the same theme: "The names of those persons who may be called for jury service should be selected at random from sources which will furnish a representative cross-section of the community."[14] The commentary in the standards sets out four general principles which are considered basic to an evenhanded and workable selection system:

> "The objectives, in brief, are these: (1) to maintain and promote the 'cross-section' character of juries, insofar as is practicable, by ensuring that the initial selection is at random from representative sources and by carefully limiting the grounds for exemption; (2) to ensure that those who serve on juries are capable of performing competently, by requiring that prospective jurors meet certain minimum

qualifications; (3) to prevent arbitrary exclusion of persons from jury service, by requiring that exclusions be based upon clearly stated objective criteria; and (4) to protect citizens and the general public from undue burdens from jury service, by recognizing certain exemptions which may be claimed and by also permitting the court to excuse other individuals for a limited time."[15]

The Supreme Court spoke to the policy reasons behind the civilian jury selection system in Taylor v. Louisiana:[16]

"We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation....Community participation in the administration of the criminal law... is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of a jury trial."

The American Bar Association Standards Relating to Juror Use and Management mandate the random selection of jurors "in order to ensure that the representativeness provided by a broadly based jury source list is not inadvertently diminished or consciously altered..."[17]

One look at the standards for military court panel selection set out in Article 25 makes it clear that the armed forces are not held to the civilian standard; in fact, the convening authority is instructed to choose the best group of court members he can find under the given parameters. The statutory criteria are clearly at odds with the civilian requirement of randomly selected venires which provide a community cross-section. The requirement of impartial criminal jury trials set out by the Sixth Amendment has not been directly applied to courts-martial. In fact, the Supreme Court has ruled on several occasions that the rights to trial by jury found in Article III, section 2 of the Constitution and in the Sixth Amendment do not apply to soldiers.[18] Courts-martial are, however, criminal prosecutions and therefore constitutional protections and rights which are not specifically denied to soldiers in the history and text of the Constitution are preserved.[19] The military accused has been, by various Court of Military Appeals decisions, accorded the constitutional due process protection of being treated equally with all civilian criminal defendants in the selection of impartial triers of fact.[20]

The impartiality requirement adopted by the Court of Military Appeals has been applied through a standard that bears close scrutiny. Stated simply, a court-martial panel selection process may be challenged if the accused can prove intent by the convening authority to improperly exclude any particular groups from consideration for selection from the statutorily defined pool.[21] This standard raises three objections: first, a convening authority may ultimately discriminate against any particular group or rank so long as he considers them for inclusion within the parameters of Article 25(d)(2); second, absent an explicit written policy or document violative of the statutory and case law guidelines, proving an improper subjective intent is practically an insurmountable burden; and third, the standard does not promote the stated policy goal because it does not prevent partial selection.[22] If, as the Court of Military Appeals has indicated, the accused will be unfairly treated by an improperly selected panel, then an interpretation of Article 25 which condemns discrimination in shaping a panel but permits discrimination in selecting individual panel members does not promote the policy objective of the impartiality requirement.[23] The policy of condemning statements which publicize discriminatory selection practices but ignoring the fact or appearance of discrimination as long as the statutory considerations are invoked is not logically consistent.

B. HISTORICAL BASIS

The purpose for reviewing the historical foundations of military jurisdiction is to provide support for the position that throughout most of the last 350 years Anglo-American courts-martial have had an extremely limited jurisdiction over peacetime civilian offenses by British and American soldiers. One of the most compelling arguments for bringing court-martial panel selection standards into line with civilian practice is the present concerted effort by military prosecutors and the Court of Military Appeals to expand military jurisdiction to a status basis.[24] This section of the article will demonstrate that historically, both in this country and in Great Britian, the legislature and the courts have been wary of suspending civil jury trial rights for soldiers accused of civilian crimes, except in limited circumstances.

1. BRITISH HISTORICAL JURISDICTION

The starting point for analyzing modern Anglo-American military jurisdiction is the Mutiny Act of 1689.[25] Colonel William Winthrop, author of the definitive nineteenth century treatise on military law, describes the passage of the Mutiny Act as a response to the mutiny and desertion of Scottish troops who wanted no part of an order from King

William of Orange to sail to Holland to pursue the crown's military goals on the continent.[26] William had been placed on the throne, in part, because of his predecessor's insistence on maintaining a standing army during peacetime and promulgating Articles of War to govern it without the sanction of Parliament.[27] William possessed enough political sense to realize that his ability to keep an army in peacetime and make rules for it depended on the assent of Parliament, so he asked for and received an act conferring a very limited jurisdiction on courts-martial.[28] The Mutiny Act was the first recognition of the principle found later in our Constitution of the responsibility of the legislature, as opposed to the sovereign, for the establishment of military law and courts-martial.[29] The law of England at that time did not provide for the operation of military courts in time of peace, so the crimes of mutiny, sedition, and desertion were made punishable by death or any other penalty decided on by the court.[30] Winthrop points out that the Mutiny Act was interpreted to preclude courts-martial for all other crimes committed within the country by soldiers.[31] The act itself declared:

> "Whereas the raising or keeping a standing Army within this Kingdome in time of peace unlesse it be with consent of Parlyament is against law.... And whereas noe man may be forejudged of life or limbe, or subjected to any Kinde of punishment by Martiall Law, or in any other manner than by the judgment of his Peeres, and according to the

knowne and Established Laws of this Realme. Yet, nevertheless, it being requisite for retaineing such Forces as are or shall be raised dureing this exigence of Affaires in their Duty an exact discipline be observed. And that soldiers who shall Mutiny or Stirr up Sedition, or shall desert Their Majestyes Service be brought to a more exemplary and speedy Punishment than the usual forms of law will allow.[32]

The language of the Act pointing out the basic right to a civilian criminal trial by a jury of one's peers, even for soldiers, is instructive as is the strict limitation of the statute to the three enumerated military crimes. Every other crime committed by a soldier inside the territorial limits was to be tried by a civilian court. The prohibition on standing armies except in time of "this exigence of Affaires" foreshadows the raging debate during the Constitutional Convention over whether a standing army ought to be maintained at all. The Mutiny Act and later, beginning in 1718, the British Articles of War were renewed together annually by Parliament for nearly two hundred years.[33]

2. EARLY AMERICAN MILITARY JURISDICTION

The American experience with military jurisdiction began, not surprisingly, with an almost in toto adoption of the British Articles of War by the Second Continental Congress in 1775.[34] Enacted with few revisions, these articles were in force, with minor modifications and enlargements, until 1789 when they were reenacted by the first Congress except for any provision which was inconsistent with the new Constitution.[35] That a standing army was viewed with a strong sense of suspicion is evident throughout the Federalist papers and by the constitutional provision that military appropriations by Congress be limited to two years or less.[36] As Madison put it:

> "A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties."[37]

This appropriations provision tracks the British abhorrence of the standing army dating from Cromwell's time and emulates the parliamentary control over the standing army (and court-martial jurisdiction) seen in the Mutiny Act.

The limitations on military jurisdiction, and the preference for civil trial of non-military common law felonies, was continued by case law[38] and the Articles of War after the Civil War. Jurisdiction expanded during the war in 1863, when common law felonies were for the first time made punishable in time of war.[39] That the preference for civil trial was still strong is demonstrated by a close reading of Articles 58 and 59 of the American Articles of War of 1874.[40] Article 58 limited the courts-martial of soldiers accused of the common law felonies and a limited number of other serious military crimes (insurrection, rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with intent to kill, wounding by shooting or stabbing with an intent to commit murder, rape, or assault and battery with an intent to commit rape) to times of war.[41] In peacetime, Article 59 instructed officers to deliver soldiers accused of such crimes to the civil authorities and made it a criminal offense to fail to do so.[42] Included in the 1920 reprint of his treatise was Colonel Winthrop's comment on the purpose and principle of Article 59 which included the admonition:

"But notwithstanding this independence of the military power within its peculiar field, the further principle is uniformly asserted of the subordination, in time of peace and on common ground, of the military authority to the civil, and of the consequent amenability of military persons, in their civil capacity, to the civil jurisdiction, for breaches of the criminal law of the land."[43]

3. EARLY TWENTIETH CENTURY JURISDICTION

World War I brought more reforms to the military justice system and became the starting point for the status argument[44] (which supports virtually unlimited military jurisdiction) that culminated in the landmark Supreme Court case of O'Callahan v. Parker[45]. The status test is succinctly stated in Kinsella v. Singleton[46]: " whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval forces.'" Proponents of the status test contend that lawful presence in the federal armed forces is sufficient, in and of itself, to confer courts-martial jurisdiction without regard to the subject matter of the offense. A significant broadening of jurisdiction took place with the long awaited revision of the Articles of War, which were adopted in 1916 after a difficult struggle between Congress and President Wilson over whether

retired officers ought to be subject to military jurisdiction.[47] The seeds of the status test were sown in the provisions making common law felonies military offenses in peacetime (except that murder and rape, as capital crimes, could not be tried in the continental United States by courts-martial in times of peace).[48] The corollary to that provision allowed the trial of murder or rape by courts-martial outside the United States.[49] Before the 1916 articles were enacted there had been no peacetime jurisdiction over any civil capital offense.[50] The extension of jurisdiction was tempered by the requirement that in peacetime, soldiers accused of civilian offenses be turned over to civilian authorities upon request.[51] Could this have been a foreshadowing of the service connection requirement?

In 1920, at the culmination of the celebrated Ansell-Crowder dispute between The Judge Advocate General Enoch Crowder and the Acting Judge Advocate General Samuel T. Ansell[52] another revision of the Articles of War was adopted. This version of the articles contained for the first time a rudimentary form of appellate review by establishing Boards of Review.[53] Other reforms included requiring sworn charges, an impartial and complete pretrial investigation, the creation of a law member to sit on the court and rule on admissibility of evidence and provide instructions, and the assignment of defense counsel for all but the lowest level of court.[54] The reforms were dramatic, but fell far short of the more sweeping reforms that Ansell had drafted in his capacity as the officer detailed to revise the

Articles.[55] General Ansell's militantly pro-reform position in the dispute was predicated on what he saw as the necessity for precluding command manipulation of the military justice system.[56] His proposals were designed to bring military criminal practice into closer consonance with accepted civilian notions of criminal due process.[57] Much of the sweeping reform embodied in the enactment of the UCMJ in 1950 originated with General Ansell's reform proposals made at the end of World War I.[58]

4. WORLD WAR II AND THE UCMJ

The UCMJ was enacted primarily as a response to public concern in the aftermath of World War II with the elimination of command influence abuses in the military justice system.[59] The UCMJ irrevocably established the rudiments of what has become an independent judiciary in the person of the law officer, the right to military defense counsel in general courts-martial, civilian review of courts-martial verdicts by the Court of Military Appeals, and expanded the power of the Boards of Review by making their decisions binding on The Judge Advocate General.[60] The Code also completed the extension of court-martial jurisdiction over civilian crimes which began in 1863 with the inclusion of the common law felonies in time of war and expanded in 1916 to encompass crimes committed in peacetime (with the previously mentioned prohibition on capital trials

within the United States during peacetime).[61] Now military courts were empowered to try capital rape and murder cases and adjudge the death penalty even if the crime occurred in the United States during peacetime.[62] The proponents of the status test saw their position elevated to its zenith. The drafters of the UCMJ had attempted to create a constitutionally valid system of criminal justice which would extend courts-martial jurisdiction over any soldier based on his status as a servicemember, without regard to the subject matter of the offense.[63] Public demand pushed the UCMJ because the record number of citizens serving in the armed forces during World War II registered their distaste with facets of the military justice system, primarily unlawful command influence.[64]

5. O'CALLAHAN AND SERVICE CONNECTION

O'Callahan v. Parker brought the progress of the status test to a halt and constricted jurisdiction.[65] O'Callahan did not reverse the status test, but instead forced it into the background as a threshold question and pinned the ultimate determination of jurisdiction on whether the offense was service connected.[66] Justice Douglas, writing for the majority, explained why the court placed the limitation on military jurisdiction:

"We have concluded that the crime to be under military jurisdiction must be service connected, lest 'cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger,' as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers....For it is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights."[67]

Two years later in Relford v. Commandant the court set down a variety of factors to be considered in deciding whether or not a soldier should be tried by court-martial.[68]

Proponents of the status test argue that less than ten years before O'Callahan, the Supreme Court had ratified the test in Kinsella: "military jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense."[69] Perhaps Kinsella can be distinguished on the facts: it concerned a civilian tried by court-martial overseas while accompanying the force during peacetime, so the language on status may be narrowly read to speak only to the analogous case of a soldier overseas. This would be an admittedly tortured reading of the dicta and perhaps it would be better to simply conclude that the court members had just changed their

minds in the intervening years. The problem with the Kinsella pronouncement is that it runs contrary to the historical limits on jurisdiction set out in the various Articles of War up to the time that the UCMJ was enacted. It may be that the appearance of an abrupt turnabout in O'Callahan is due to the blurring in the distinction between in personam jurisdiction and subject matter jurisdiction. No one can seriously argue the point that historically, military jurisdiction over the person extended to all soldiers serving the federal government. The extension of military jurisdiction to cover the subject matter of various offenses had just as obviously been limited until the UCMJ was enacted, albeit with less stringent limits after 1916.

The Military Justice Act of 1968 made several reforms in the due process and command influence areas by replacing the law officer with an independent military judge and prohibiting a convening authority from rating or controlling the judge or criticizing a defense counsel for zealous representation.[70] It did not address jurisdiction. Congress left the field of jurisdiction to the Court of Military Appeals until 1983.

6. ERODING O'CALLAHAN

Since the O'Callahan decision, the question of status has revived to the point that it is again squarely before the Supreme Court, with the government

arguing vehemently for overturning the requirement of service connection in its favor.[71] The erosion of the service connection requirement can be traced to several decisions of the Court of Military Appeals, beginning with United States v. Trottier[72] in 1980. In Trottier the court extended subject matter jurisdiction over practically all off-post drug offenses and moved away from a strict application of the Relford factors,calling its decision a "suitable response to changing conditions that affect the military society."[73] Most recently, the court has applied the Trottier changing conditions language in lieu of a traditional Relford analysis in United States v. Solorio,[74] and has found that recent increased concern for crime victims, the impact of child sexual abuse on soldier parents, and the problem of reassigning a suspected child abuser to a new duty location all formed a basis for extending subject matter jurisdiction to off-post child sexual abuse offenses against military family members. Other recent cases have found off-post assaults by one soldier on another to be service connected without a careful Relford application[75] and have hinted that the position of special trust and confidence that officers enjoy may confer status-based jurisdiction without reference to Relford at all.[76]

An important facet of the continuing extension of due process to the soldier was the adoption in 1980 of the Military Rules of Evidence.[77] The rules are virtually identical to the Federal Rules of Evidence, differing only in a few places where the peculiarities of military practice require it.[78]

The Military Justice Act of 1983[79] has put additional due process and procedural protections into the system. The act divested the convening authority of any control over judges and defense counsel.[80] It also provides for direct Supreme Court review of Court of Military Appeals decisions.[81] Unlike its predecessor, the 1983 act does mention jurisdiction and in the Manual for Courts Martial, 1984 (MCM 1984) a comment to the rule addressing jurisdiction over the offense makes the intent of the drafters clear: "This rule is intended to provide for the maximum possible court-martial jurisdiction over offenses."[82]

Regardless of the outcome of the status-service connection debate, it is incontravertible that military subject matter jurisdiction has expanded beyond any notion the framers might have had of the extent of jurisdiction over the offenses conferred by the Articles of War in 1789. An important facet of the historical analysis of military jurisdiction is the continuing civilianization, or more accurately, the continuing extension of due process protections to soldiers through the evolution of the military justice system.

The strongest argument in the government brief before the Supreme Court in the Solorio case for the adoption of the status rule is that the criticisms leveled against the system by Justice Douglas in O'Callahan have been addressed by subsequent congressional enactments and revisions of the MCM.[83] This is correct to a point. In the eighteen years since O'Callahan, an independent judiciary has been

established[84] and rules of evidence practically identical to the Federal Rules of Evidence have been promulgated.[85] However, not all of the problems have been remedied. The exception that the Supreme Court took to the military panel selection process has not been acted upon. It is for this reason that the continued drive to expand military jurisdiction[86] necessitates reform in the panel selection process. If the historical restrictions on subject matter jurisdiction constraints are relaxed, then heightened due process concerns come into play. Lest it be proposed that Justice Douglas stood alone in his criticism of the present military jury selection system, Justice Black's language in Toth v. Quarles instructs us that:

> "There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.... Consequently considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury."[87]

III. MILITARY DUE PROCESS NOTIONS SUPPORTING RANDOM SELECTION

The genesis of the concept of military due process begins with General Ansell's observations in 1920 on the un-American character of military justice.[88] Ansell contends that the system existing in his day was a historical abberation that was adopted unwittingly from a system of government that was at such odds with our notions of political power that we fought a revolution to free ourselves from it.[89] His argument runs that:

> " Such exercise of penal power should be in keeping with the progress of enlightened government and not inconsistent with those fundamental principles of law which have ever characterized Anglo-American jurisprudence. The Military Code, being a penal code, should be applied to none except on probable cause. It should be specific with respect to the definition of the offense denounced and the penalty provided. It should particularize with respect to matters of procedure, that the trial may be full, fair, and impartial. It should require recognition of those rules of evidence which our jurisprudence has evolved as necessary to elicit those facts upon which the ultimate conclusion of guilt or innocence may with safety and justice rest. With the utmost care it should guarantee those

safeguards and that protection for an accused whose life and liberty are placed in jeopardy, which are the pride of our enlightened civilization. None of these things does our code do, and none of these things can it do, until it changes its base from the ancient English theory and comes to conform to American principles of government."[90]

From its outset, the Court of Military Appeals has struggled with the notion of military due process and its application to soldiers accused of crimes. As early as 1951, in the seminal case United States v. Clay[91], the court established that soldiers are entitled to a form of due process. Clay does little more than judicially recognize that in enacting the UCMJ, Congress intended that soldiers receive a fair trial, although it does go on to say that individual rights in the military justice system are patterned after federal civilian case rules and defines military due process as:

"a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights....we do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress. But, this does not mean that we

> cannot give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes. As we have stated in previous opinions, we believe Congress intended, insofar as reasonably possible, to place military justice on the same plane as civilian justice, and to free those accused by the military from certain vices which infested the old system."[92]

Clay was an effort to be all things to all critics because it sought to calm military command fears about basing military due process on the vagaries of constitutional law while proclaiming to Congress that military and civilian due process were essentially equivalent.[93] In doing so, it never squarely addressed the application of constitutional rights to courts-martial. This prevarication led to a questionable result in United States v. Sutton[94], where the court backed away from the power it had seemingly claimed in Clay to apply constitutional principles. Nine years later, in United States v. Jacoby[95], the court significantly expanded the scope of military due process by holding that "the protections in the Bill of Rights, except those which are expressly or by necessary application inapplicable, are available to members of our armed forces." The only expressed inapplicability is the fifth amendment right to

presentment or indictment by grand jury prior to trial for a capital or infamous crime.[96]

Military due process was cemented by the Court of Military Appeals decision in United States v. Tempia,[97] which extended the Miranda[98] decision's protections to soldiers and in dicta acknowledged that the court was required to follow and apply the Supreme Court's constitutional decisions. Judge Ferguson made the point clearly: "The time is long since past...when this court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, ipso facto deprived of all protections of the Bill of Rights."[99] Tempia expressly adopted the subordination of the Court of Military Appeals to the Supreme Court, but as early as 1961 Chief Judge Quinn explained that military due process was not entirely statutory in origin, as some commentators had urged, but was closely parallel to civilian due process and indeed, "the Constitution was still the primary point of reference for military due process."[100]

After the UCMJ was enacted, the Supreme Court first spoke to the question of military due process failings in Burns v. Wilson[101] by extending civilian court review of courts-martial proceedings through habeas corpus petitions alleging that military courts had denied an accused a fundamental right. Prior to the UCMJ, collateral review of courts-martial had historically been limited solely to jurisdictional questions.[102] The Military Justice Act of 1983 placed another link in the chain of military due process by creating a right to petition the Supreme Court

directly by writ of certiorari after a Court of Military Appeals decision.[103]

The application of military due process to the sixth amendment right to trial by an impartial petit jury begins with the baseline observation that "due process demands a fair hearing."[104] As previously noted, the only expressed limitation in the Bill of Rights on a soldier's constitutional guarantees is the denial of the right to grand jury indictment.[105] Historically, three other constitutional rights have by "necessary implication"[106] been restricted in their application to soldiers: the right to bail, the right to full freedom of speech, and the right to trial by impartial petit jury.[107] The O'Callahan decision discussed the implied limit on the right to jury trial at length and found the limitation tied inextricably to the restricted scope of military subject matter jurisdiction enumerated by the service connection doctrine.[108] The Court of Military Appeals decision in Solorio confirms the link by stating: "the emphasis in O'Callahan...was on assuring that, as far as feasible, service members would retain their constitutional right to grand jury indictment and trial by petit jury."[109]

Without exception, decisions of the Supreme Court tell us that the military defendant has no right to a jury trial.[110] According to Colonel Frederick B. Wiener, the highly respected military legal scholar, there never has been one.[111] This is true if we limit the frame of reference to the military court system itself, or look at offenses that have been traditionally recognized only in the military courts.

A blanket assertion of the historical denial of the jury trial right to soldiers ignores the reality of practice recognized by Articles of War 58 and 59 that civilian crimes were to be tried in civilian courts. Even after 1916, a limited right to jury trial for capital rape and murder cases was retained.

Military cases have followed the Supreme Court's rule in holding that the jury right does not extend to soldiers tried at courts-martial.[112] The issue of whether the expansion of jurisdiction post-Trottier has triggered the extension of that right to soldiers has not yet been litigated. A return to the status test or a virtual eviseration of the service connection test by the Supreme Court in the anticipated Solorio decision may spark such a challenge. At any rate, military due process has been held to require a court panel free of members which are or appear to be a "packed" court.[113] Systematic exclusion of any potential panel member for consideration because of rank has been condemned by the Court of Military Appeals.[114] This is a difficult concept to reconcile with the holding by the court that a process in which the convening authority considers soldiers of all grades but selects few or none from the three lowest enlisted grades is consistent with the dictates of Article 25(d)(2).[115] This is the crux of the fairness criticism leveled at the current selection process: if the convening authority wishes to exclude any certain rank (especially lower ranks) he may do so simply by asserting that he has gone through the mental exercise of considering them and finding them unqualified. So

long as the correct phrases are uttered, the practical result is the same as if an improper basis for exclusion was used. The convening authority may exclude major groups of eligible soldiers based on a highly personal (read: subjective) interpretation of a statute deliberately written to allow wide individual discretion. Defenders of the current system would remark that this was Congress' intent, but to allow a selection process condemned in one case to become acceptable in another through the incantation of important catchphrases is not logical. Even the Court of Military Appeals has shown signs of being uncomfortable with the current selection process, saying:

> "Suffice it to say that court members, hand-picked by the convening authority and of which only four of a required five ordinarily must vote to convict for a valid conviction to result, are a far cry from the jury schedule which the Supreme Court has found constitutionally mandated in criminal trials in both federal and state court systems." [116]

In the same decision the judges noted that: "Constitutional questions aside, the perceived fairness of the military justice system would be enhanced immeasurably by congressional reexamination of the presently utilized jury selection process."[117] Although the court has shown this preference for

change, they apparently plan to rely on Congress for any reforms, eschewing judicial activism. The Court of Military Appeals has been active in hearing cases and interpreting Article 25, despite their ambivalence with the selection system. Along with the previously mentioned cases, the court has gone so far as to fashion an under-the-present-circumstances prima facie rule that privates (pay grades E-1 to E-3) do not, as a rule, meet the statutory selection criteria and may be systematically excluded from consideration.[118] This decision was distinguished from the ban on the systematic exclusion of lieutenants and warrant officers in United States v. Daigle[119] because the then current promotion outlook for privates was such that many of them had only a few months time in service and would have difficulty meeting some of the criteria for selection under Article 25. The rather tortured logic of arguing that a second lieutenant, a warrant officer one without significant prior service, or a direct commission first lieutenant is deserving of serious consideration, while a private (who according to current enlistment standards is among the most highly educated group of entry level soldiers in the Army's history) does not even merit a look, is illustrative of the difficulties that the current system presents to convening authorities and the courts alike.

The Court of Military Appeals had another opportunity to examine the application of sixth amendment jury trial rights in the military after the Supreme Court handed down its decision in Ballew v. Georgia[120], holding that state trials of non-petty

offenses must be before juries of six or more persons. Because general courts-martial may adjudge a sentence when composed of only five members, the issue was raised in United States v. Montgomery[121] and disposed of by the Army Court of Military Review which cited the familiar precedent that the jury trial right conferred by the Sixth Amendment does not apply to the military. The Court of Military Appeals saw fit not to disturb precedent when they vacated a petition for review previously granted on the issue of whether the UCMJ panel size minimum (five members) violated an accused's fifth and sixth amendment rights.[122]

The Court of Military Appeals has ratified essentially random selection systems, with the provision that the convening authority approve the list, consistent with his responsibilities under Article 25(d)(2).[123] The court has even gone so far as to say in dicta: "we are not unaware that attractive arguments can be made for a truly random selection method akin to those utilized in civilian courts."[124] The court has refused to judicially establish such a requirement, deferring to the legislature to accomplish that reform, if and when Congress sees fit to do so.[125] Some have argued that congressional action is unnecessary, because random selection is theoretically permissible within the present confines of the statutory selection scheme.[126] Of course, regulatory mechanisms would have to be put in place to guarantee uniformity of practice Army-wide.[127]

In sum, military due process requires an impartial jury but has not been interpreted to require a jury of peers, a particular number of panelists (except the statutory required quorum), or random selection of those serving on the panel. The ramifications of the expansion of military subject matter jurisdiction as regards the application of sixth amendment jury trial rights to soldiers is as yet an open question, but the clear thrust of O'Callahan and the Court of Military Appeals decision in Solorio is that civilian jury selection standards are not yet implicated in the military system because courts-martial jurisdiction is still limited. If the Supreme Court changes the rule set out in O'Callahan, the precedents concerning jury trial rights being denied to soldiers will be open to challenge.

IV. THE CONVENING AUTHORITY AND UNLAWFUL COMMAND CONTROL IN PANEL SELECTION

Joseph W. Bishop, in his book Justice Under Fire, points out that "the code's very general, not to say platitudinous, criteria obviously leave the commander who appoints a court-martial a lot of leeway to select the sort of members most likely to do what he regards as justice- i.e., to pack the jury."[128] Whether commanders who have this attitude are prevalent or uncommon, the clear thrust of Bishop's comment is that even the threat of such power casts doubt on the fairness of the entire system. The Court

of Military Appeals puts the case against unlawful command control succinctly: "Command influence is the mortal enemy of military justice."[129]

Command influence may affect any phase of the court-martial process, and panel selection is no exception. Since its inception the Court of Military Appeals has dealt with panel selection method challenges. United States v. Hedges[130] provides a classic example of an unlawfully stacked panel: the nine panel members included a military lawyer, two provost marshals from different jurisdictions, an inspector general, the executive officer responsible for operation of a Marine brig, and a member of an inspection and survey board. The court noted with approval in its opinion the appellate defense counsel's argument which pointed out that such a court composition was akin to having an attorney general, a county sheriff, a city police chief, a state investigating agent, and a penitentiary warden on a civilian jury.[131] Although taken as a whole the appearance of impropriety in the Hedges case is overwhelming, at least one commentator has pointed out the inescapable conclusion that if these panelists had been chosen individually for different panels, any one of them would have been a qualified member.[132] The present limit on peremptory challenges of one to a side[133] shows its limitations here. Although the drafters of both the 1969 MCM and the 1984 MCM added the admonition that cause challenges should be liberally granted, this policy is not always followed.[134]

In United States v. Greene the Court of Military Appeals examined a method which systematically excluded all potential panelists unless they were lieutenant colonels or colonels, and determined that the appearance of impropriety had been created by such a practice.[135] The court did not rule definitively that the selection procedure employed was improper per se; instead, they examined several factors and concluded that there was "a reasonable doubt" as to whether the court panel was unlawfully selected, and resolved the doubt in favor of the accused.[136] The Daigle case held improper a selection system where the statutory guidelines were not used at all and lieutenants and warrant officers were not selected for a panel for almost two years.[137] The court found a fixed policy of excluding officers in the mentioned grades because the convening authority wanted more senior officers sitting in judgment.[138]

More recent, and therefore more disturbing, are two cases which illustrate that improper command influence in panel selection is still alive in the post-1984 MCM era. United States v. Autrey[139] involved the trial of a lieutenant by a jury composed solely of field grade officers.[140] The convening authority decided to appoint only field grade officers after he received the advice of his staff judge advocate that 1LT Autrey was well known among company grade[141] officers at the installation where the trial was held.[142] The Army Court of Military Review found that company grade officers were impermissibly excluded because captains, as a group, would be well qualified under the Article 25(d)(2) standards.[143]

United States v. McClain involved a more subtle violation of article 25(d)(2), where the staff judge advocate, upset with what he called unusual sentences (the trial court found as a matter of fact he was upset with lenient sentences), advised the convening authority to consider that the unusual sentences were usually proposed by junior officers and enlisted panel members.[144] As expected, the convening authority considered the advice and excluded junior enlisted members from the panel and substituted senior noncommissioned officers in the place of the junior officers when an enlisted panel was requested.[145] The Court of Military Appeals adopted the trial judge's findings of fact and found that the "exclusion of lower rank enlisted members- as well as the replacement of junior officer members- were done in order to obtain a court membership less disposed to lenient sentences."[146] Judge Cox seemed exasperated when he wrote in his concurring opinion:

> "If staff judge advocates and convening authorities would carry out their pretrial and post-trial duties in accordance with the law and entrust what happens during the trial to the military judge and the court-martial members, we would not have to resolve allegations of tampering with the outcome of a trial."[147]

Cases such as Autrey and McClain demonstrate the ineffectiveness of the so-called built in protections against unlawful command influence in the UCMJ. Article 37(a) of the UCMJ sets out in strong language the prohibition against any person subject to the code attempting to improperly influence a trial:

> "No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its function or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts."[148]

Although this language has been present in the UCMJ since 1950, it appears that only one commander has ever been prosecuted for violating Article 37 by being charged under Article 98, which makes it a criminal violation to knowingly fail to follow the procedural rules of a court-martial.[149] Such a fact is not really

surprising, given the lack of precision in the cases as to what is proper or improper influence, and the ability of the commander to influence the composition of a panel by completely legal methods.[150] A quick survey of the cases reveals that in many instances, the commander who was subsequently determined to be acting unlawfully was doing so on the advice of his staff judge advocate.[151]

The inescapable conclusion reached after reviewing the thirty seven years of panel selection under the UCMJ is that the potential for unlawful command control exists unfettered by the well intentioned proscriptions in Article 37.[152] As Senator Birch Bayh said in writing on reform measures embodied in the proposed Military Justice Act of 1971: "So long as such command control survives, the fact, implication, or appearance of fundamental unfairness can never be eliminated."[153] This observation is not meant to imply that most or even many commanders use the ambiguities of Article 25(d)(2) to subvert the stated Court of Military Appeals goal of an impartial panel; however, the commander's ability to legally shape the composition of the members to conform to his personal notions of justice and discipline is a tremendous advantage to the prosecution's case.[154] Such an appearance of the availability of an advantage does not comport with the stated goal of the Court of Military Appeals to provide a forum where impartiality is not impaired.[155] Impartiality, like Caesar's wife, ought to be above suspicion. If, as the Court of Military Appeals tells us, the exercise of unlawful command influence tends to deprive soldiers of their

constitutional rights,[156] then the appearance of unlawful command influence (regardless of its provable presence) makes the military justice system appear to deprive soldiers of their fundamental rights. As Judge Quinn said: "An unbiased jury is, of course, a sine qua non for a fair hearing. The requirement is basic in courts-martial, but the requirement is more difficult to apply."[157] General Ansell frames the tension in the military justice system as a struggle between two opposing theories: one being that the Army and its justice system is simply a tool of the sovereign and ultimately of military command, and the other that the Congress holds the exclusive power over our rules and thus the military justice system ought to be thought of as an establishment of the people regulated by their principles of law.[158] Ansell excoriates command influence and proclaims that "it has ever resulted, as it must ever result, in such injustice as to crush the spirit of the individual subjected to it, shock the public conscience and alienate public esteem and affection from the Army that insists on maintaining it."[159]

Obviously, General Ansell would have been heartened by the breadth of reform measures enacted since 1919; however, he would also hear philosophical echoes of what he called the reactionary view in the arguments against random panel selection. A more modern view of the role of military justice and its relation to the role of the commander has been given by former Chief of Staff General William Westmoreland:

"I do not mean to imply that justice should be meted out by the commander who refers a case to trial or by anyone not duly constituted to fill a judicial role. A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline. The protection of individual human rights is more than ever a central issue within our society today. An effective system of military justice, therefore, must provide of necessity practical checks and balances to assure protection of the rights of individuals. It must prevent abuses of punitive powers, and it should promote the confidence of military personnel and the general public in its overall fairness."[160]

Although the bugbear of improper command influence seems, as Jesus said about the poor,[161] to be with us always, reforming the panel selection process will go far in alleviating the susceptibility of the present system to abuse.

V. RANDOM SELECTION PROPOSALS

Over the years several critics of the traditional selection process have proposed random selection methods designed to meet constitutional jury selection standards. Stated very generally, those standards boil down to requiring a jury that represents a fair cross section of the community from which it is drawn.[162]

The chairman of the Committee on Military Justice and Military Affairs of the Association of the Bar of the City of New York, Mr. Steven S. Honigman, sets out the rationale behind these proposals:

> "In another important respect, which is not adressed by either of the pending bills, the commander should be relieved of an additional administrative burden, that of the personal selection of members of the courts-martial jury under article 25 (d)(2). Perhaps no other element of the uniform code contributes as strongly to the perception and possibly at times the reality of unfairness as the fact that the same commander who personally decides to invoke the military justice system also selects the jurors who determine guilt or innocence and impose the sentence.
>
> This spectre of command influence over courts-martial proceedings should be eliminated. In its place we recommend that members of the courts-martial be chosen at random from a pool of eligible individuals."[163]

Some of the proposals seem more radical than others; for instance, the proposal endorsed by Senator Mark Hatfield would transfer jurisdiction over some crimes to the federal district courts.[164] Other reformers realize the benefits of the expeditious nature of military justice, the lack of expertise of most civilians in military matters, the horrific backlog in the civilian system, and the need to have a system that can go with the troops when deployed overseas or in time of war.[165] Nevertheless, it is a fair question to ask why the trial of soldiers in the federal district courts is not a reasonable idea, especially in the light of continuing illegal command control in the military justice system.

Professor Bishop addressed and examined the pros and cons of divesting the military of criminal jurisdiction in an address at The Judge Advocate General's School on 30 August 1973.[166] Bishop's conclusion that such a system would be difficult is bolstered by the four reasons he gives: first, civilian justice grinds exceedingly slowly and punishment is uncertain and unlikely to contribute to maintaining military discipline; second, the commander does have some legitimate role in deciding what cases should go to court and whether clemency ought be applied to the sentence once rendered; third, military offenses have no analogous civilian counterpart and require the application of some expertise to determine what community norms are violated; and fourth, the cost of sending a district court overseas or bringing all witnesses, counsel and the accused back to the

United States for trial would be prohibitive and disruptive.[167]

The total divestiture by the military of its justice system is neither practical nor necessary; therefore, the focus of the rest of this section will be on those reform measures aimed at the panel selection system within the confines of the present system (or a close approximation of it). Related reforms like the provision of more peremptory challenges and the problem of sentencing by military judges exclusively will also be touched upon.

The Bayh proposal on random juror selection was made as part of a complete package of reforms submitted to Congress in 1971.[168] The jury was to be randomly selected by the administrative department of a separate court-martial command (somewhat resembling the present day United States Army Legal Services Agency) in a method modeled after federal jury selection.[169] Any active duty soldier with more than one year in service would be eligible to serve on any jury and apparently the system would be without the present rule against juniors sitting in judgment of seniors.[170] Peremptory challenges would be increased to three at a special court-martial empowered to adjudge a bad conduct discharge (BCD), six at a general court-martial, and ten in a capital case.[171]

Senator Hatfield's plan, submitted in the same session, was more limited in scope.[172] The court would retain the proscription on trial by juniors, but the ratio of enlisted to officer would increase from one third to one half.[173] One commentator has argued that the retention of the rank consciousness implicates

equal protection problems because those in the officer ranks receive a closer approximation of trial by peers than do the enlisted soldiers.[174] The requirement of random selection of both juror pools would be established.[175]

Mr. Joseph Remcho has proposed a dual system of justice, where serious offenses, both civilian and military, would be tried in a proceeding that guaranteed the sixth amendment jury trial rights, and other less serious offenses would be tried in courts which appear to be the functional equivalent of today's special court martial without the power to adjudge a punitive discharge.[176]

Other proposals have come from within the Judge Advocate General's Corps itself. The ubiquitous General Ansell proposed restructuring the system by naming exactly eight members to a general court and three to a special court.[177] The convening authority would choose a panel of officers, presumably a number greater than the eight required, but a judge advocate would select which of the panel members would hear each case.[178] The court would contain three members of the same rank as the accused (one if at a special court) and would require a three-fourths vote to convict, thereby requiring the concurrence of at least one peer.[179] Ansell also wanted to increase peremptory challenges to two.[180] This seems to be one of the few proposals Ansell made that was never acted upon.

Another in-house reform proposal is an interesting one made by Major General Kenneth J. Hodson, retired The Judge Advocate General (TJAG). General Hodson revealed his views on jury selection in a wide ranging

address at The Judge Advocate General's School on the future of military justice.[181] The jury plan in the extensive reforms proposed would be initiated by the military judge, who would ask for a number of names of specified ranks from the units in the area.[182] Grades E-1 through 3 would be excluded as being too inexperienced, and all other ranks would be placed in a jury wheel or similar random selection device in the predetermined rank ratio.[183] Panel sizes would conform to the minimums we have today: five for general courts and three for special courts.[184] General Hodson's remarks on the reasons for internally generated reform are noteworthy:

> "So our system is good; it is more protective of the accused's rights than the systems of almost all states. But we can't stand pat because too many people believe that we don't have a good system....If our system is not seen to be good,then we have to take some action,and the action in this case must be more than a Madison Avenue public relations campaign. We must think and plan ahead; if we don't propose acceptable improvements, we may get an unacceptable code of military justice thrust upon us by a well-intentioned but not too well informed Congress."[185]

Two other proposals have been put forth by practicing judge advocates. Colonel (then Major) R. Rex Brookshire II made an extensive survey of attitudes Army-wide, both of line officers and of judge advocates, towards military justice and in particular toward a random selection system. His proposals are the most modest reforms to be examined, and probably the easiest to implement because they call for no legislative action.[186] This plan would use the post locator card file common to all military organizations as the starting point for juror selection, and would draw some substantial number of names for screening.[187] Once the selecting official had pulled the names, a questionnaire would be sent to each prospective juror to determine any disqualifying factors.[188] After the questionnaires were returned, the final list of eligibles would be prepared for ratification by the convening authority, who would randomly select the required number for whichever trial was scheduled during that period of time.[189] A similar random selection and convening authority ratification scheme has passed Court of Military Appeals scrutiny in United States v. Yager[190], and so has the advantage of prior court approval over the other proposals discussed. In Yager the convening authority at Fort Riley, Kansas established a program where names for a prospective panel member list were compiled from unit personnel rosters, placed on a "Master Juror List" and screened by having those chosen complete a questionnaire concerning their qualifications to sit as jurors.[191] Yager's panel was selected from this list, at random, and although his

counsel commended the concept, he challenged the panel because privates in the two lowest pay grades were not considered for selection.[192] The Court of Military Appeals upheld the exclusion on the grounds that soldiers that new to the Army would not meet the congressional statutory requirements, although the court did say that any future promotion slowdown for privates might cause them to reexamine that finding.[193] Of course, convenience is not always a blessing. The relative ease with which Colonel Brookshire's regulatory scheme could be implemented, when compared to a legislative proposal, carries with it the corollary that it may be more easily ignored or reversed as a matter of policy later.

The final proposal to be examined is one developed by Colonel Hubert G. Miller on request of General Hodson.[194] Colonel Miller's proposal resembles Colonel Brookshire's, except that it calls for a statutory change to Article 25 to reflect the mandate that random selection be accomplished.[195] The method of developing the names to go into the panel pool (through the use of DD Form 1175 locator cards) is identical and Brookshire acknowledges Miller's development of the idea.[196] Colonel Miller's system of selection once the raw panel pool had been developed was to periodically gather a "Courts-Martial Members Selection Committee" (CMMSC) made up of a non-SJA staff officer, an SJA representative, a TDS representative, the post Command Sergeant Major or his delegate, and a non-commissioned officer from the SJA office who would act as recorder for the committee.[197] The committee would develop a list of potential

members manually from the locator card file, or if data processing was available at the jurisdiction, the commander of the data processing unit would furnish a randomly generated list from the installation master personnel file.[198] Once the required number of names (a multiple of the local average monthly caseload x 20) was pulled or generated, questionnaires would be sent to each potential member by the SJA office.[199] Colonel Miller would design the questionnaires so that any yes answer would indicate a possible ground for disqualification, making them much simpler to screen.[200] A final drawing would then be conducted at random from the qualified questionnaires by the selection committee and a list of names, in the order drawn, given to the recorder who would make panel selections from the list, in order, upon request of a trial counsel who had a court date.[201] Obviously, this would necessitate skipping some on the list who would be statutorily disqualified (same unit, junior in rank, accuser, or convening authority). These soldiers would be first in line for the next panel until they were selected. Once selected, the name would be crossed off the list, and when the list was exhausted, the committee would go through the process again.[202]

VI. RELATED ISSUES

Along with random selection, there are two related issues that affect fairness in the military justice system. The ancillary question of peremptory

challenges seems to be a recurring theme with all of the reformers. Chief Judge Everett, testifying before the Senate Subcommittee on Manpower and Personnel of the Senate Armed Services Committee, expressed the view that the members of the court see merit to the position that the peremptory challenge limit be raised, as long as manpower problems do not result, and believe that such a change would reduce the number of appeals assigned for wrongful failure to grant cause challenges.[203] Colonel (retired) John Jay Douglass, a former commandant of the Judge Advocate General's School, has testified before Congress that the American Bar Association's Standing Committee on Military Law recommends an increase in the number of peremptory challenges to two per side.[204] Colonel Douglass also suggested an alternative: "Consideration might be given to following the philosophy of the federal rules and grant one peremptory challenge to the prosecution and two to the defense. Thereafter, the problem of additional challenges could be left as a matter of court rule to the military judge."[205] The only real objection to expanding the number of peremptory challenges is the additional manpower committment required to support the system. Since the focus of providing the additional challenges is to blunt any potential panel stacking, Colonel Douglass' proposal seems to be the best compromise. Giving the defense an additional challenge will give the appearance of concern for fairness without siphoning off the manpower required to support a larger number of peremptories. One need only consider the rather extensive addition of members required to support

Senator Bayh's suggestion of six challenges per side at a general court-martial to see the impact on mission accomplishment, especially at a small stateside post or a brigade sized kaserne in Germany where an all officer court was to be empanelled. Providing the additional peremptory challenge will also give the military accused more ability to shape the panel which will shape his destiny, and will serve to blunt the complaints of cynics who remain skeptical about the ability of an unscrupulous commander to meddle, even in a random selection environment.

Another ancillary question relating to panel selection is the current debate over proposals to eliminate the jury sentencing option in the military and go to a straight judge sentencing system akin to most civilian jurisdictions. Such elimination of this particular facet of military procedure in favor of the more restrictive civilian practice is something that does not enhance due process for soldiers. Indeed, the results of a survey of defense counsel Army-wide showed that over two thirds favored retaining the option of panel sentencing.[206] The services themselves are split over this issue. The Army and Air Force favor retaining the present system, while the Navy, Marines, and Coast Guard favor a system where military judges do all sentencing.[207] Chief Judge Everett has reported the Court of Military Appeals' position to Congress, saying essentially that the judges neither support or condemn such a system.[208] The chief judge has outlined the pros and cons of such a system. In favor of exclusive judge sentencing, transferring the sentencing function to professionals would conform to

the American Bar Association Standards for Judicial Administration, it would speed sentencing, it would eliminate any confusion or error in giving sentencing instructions to the panel, and it would probably introduce consistency and predictability in that phase of trial.[209] On the other hand, factors favoring retention of the present system include panel familiarity with community norms that circuit riding judges may not have, maintaining a traditional vehicle for involving servicemembers with the justice function, and insulating judges from individual criticism if their sentences do not conform to local perceptions of justice.[210] On balance it seems that, given the lack of firm consensus for change, the present system should be retained. Certainly it works no hardship on the justice process, as the option of panel sentencing has existed since the revolution, and it compares favorably to the lack of any choice in the civilian system. Giving soldiers additional rights that cost the system nothing in comparison to past practice can only make the military justice structure look fairer to both civilian observers and military accused.

VII. CONCLUSIONS AND RECOMMENDATION

Reforming the courts-martial panel selection process in the armed services is an idea that is ripe for action. The historical scope of jurisdiction in the military was narrow. As the jurisdiction of courts-

martial over the subject matter of offenses grew incrementally, so to did military due process protections for soldiers. Since the enactment of the UCMJ, and the rise, fall, and rebirth of the status argument, panel selection techniques have come under close scrutiny from the Supreme Court and the Court of Military Appeals, but the ultimate authority of Congress to provide a system of trial that does not guarantee sixth amendment jury trial protections has not been judicially challenged, in large part because of the now tenuous argument that military subject matter jurisdiction is still limited. Most of the due process reforms were sparked by civilian outcry over command influence in the aftermath of both world wars. Professor Sherman emphasizes the link between the court-martial panelists and unlawful command control in urging reform:

> "The movement for civilianization of military law has achieved only limited success in the 50 years since General Ansell proposed an overhaul of the court-martial system. However, the tremendous changes which have taken place in the nature of the military suggest a renewed movement for reform of the basic structure of the court-martial, with particular emphasis upon further limitation of command control and broadening of court membership. These changes, far from threatening the dissolution of proper military order, appear to promise a more equitable system of justice which will strengthen the morale of servicemen and

restore the confidence of the public in the quality of military justice."[211]

Random selection would be a large step toward ridding the armed services of the nagging irritation of unlawful command control. The suggested solution is to adopt a system based in large part on the conservative reforms suggested by Colonels Brookshire and Miller.

Of course, if the status test is adopted in favor of the present service connection test, due process considerations springing from the exercise of unlimited jurisdiction may militate for more radical reforms in the panel selection system in order to bring it into line with accepted civilian standards. These might include the abolition of the proscription on trial by juniors, dispensing with any composition ratio requirement between officers and enlisted soldiers, and an increase in the minimum number of panel members required to meet the six man Ballew standard. Another possibility inherent in the adoption of a status test for jurisdiction is the extension of the right to a grand jury indictment to soldiers. The potential exists for the proponents of unrestricted jurisdiction to paint themselves into the constitutional corner of total civilianization.

The author submits that adopting the less drastic reform of random selection may provide enough due process to withstand the inevitable sixth amendment constitutional attack following a reversal of

O'Callahan, and failing that occurrance, works no hardship on the military justice system. The provision of the pretrial investigation right under Article 32 arguably provides more protection to a military accused than does the grand jury right, and almost certainly meets the Hurtado v. California requirement to provide a just and fair alternative procedure.[212] Thus, the real target for the challenge of failing to protect soldiers' sixth amendment rights is the panel selection process and composition requirements. Random selection meets the civilian standard and leaves only one front vulnerable to attack, allowing the military to defend the system in accord with the principle of war of economy of force: allocating the minimum essential combat power to secondary efforts.[213]

The author suggests the following steps be adopted to reform the panel selection process. First, legislative action should be taken to accomplish the transition to random selection. This will remove any internal temptation to reverse a regulatory system as TJAGs and Chiefs of Staff change, and will ensure a suitable experimental period to observe how the changes impact on the justice system. Second, the oversight committee (CMMSC) proposed by Colonel Miller should be put in place through a regulatory change. This will provide flexibility to rework the system if the process proves unwieldy, without the major effort required for legislation. Third, the screening process should include a bar on those who have not served for at least one year, without regard to rank. A year is a reasonable period to allow for assimilation of community and institutional norms, and will not have

the effect of depriving a great number of soldiers of the opportunity to participate in the justice process, or put the system in a Yager quandry where the exclusion by rank would have to be reexamined each time promotion time-in-grade requirements changed.

The mechanics of random selection are of secondary importance when compared to the fairness, both real and perceived, of the method utilized. This concern dictates that the convening authority (or his delegate as permitted under Article 25(e)) be restricted in his ability to excuse members as well as the obvious removal of his selection power. An unscrupulous commander could otherwise decide to keep excusing members until he had shaped a panel by exclusion, rather than inclusion. The best solution to such an abuse would be a challenge by defense counsel to the panel array in a pretrial session. Such a review should be provided for in much the same manner that the current UCMJ provides for a "good cause" review of the excusal of a panel member after the court is assembled.[214] A suggested statutory revision to accomplish random selection is provided at Appendix A.

These proposals have several advantages: first, they do not radically change the way in which military justice operates; second, they sever the convening authority from the selection process but leave him in the referral system; third, they broaden the military due process rights provided to soldiers by giving part of the jury trial protection, namely the right to a jury selected at random from the community; fourth, they will impose little or no cost to the Army; fifth,

they keep proper military control over military justice by ensuring panels understand the complexities of military life; and sixth, they recognize and act on the largest source of complaint about our system for the last 60 years. It should be understood that this writer supports the statutory change proposed by Colonel Miller rather than the administrative measures favored by Colonel Brookshire. The vagaries of policy are less comforting than the stability of statutory enactment.

The proposed change should carry with it a change to increase the number of peremptory challenges to two on the defense side. This number would adequately protect the accused without placing a significant additional burden on command. Suggested legislation to accomplish the change is included at Appendix B.

The appearance of fairness and the extension of meaningful due process rights consonant with constitutional principles should be pursued vigorously in the military justice system unless such pursuit would work a substantial hardship on the Army's ability to function. This is especially true in the light of the ever widening scope of military jurisdiction. Taking a proactive stance in eliminating the appearance of unfairness will prevent the need to adopt a reactive damage control position in the face of an adverse ruling by the United States Supreme Court in a case challenging the convening authority's role. This proposed reform will place little or no burden on the Army and will go far to bolster the oft repeated claims that the military justice system is second to none in fairness to its participants.

APPENDIX A

REVISION OF ARTICLE 25

825. Art. 25. Who may serve on courts-martial

...

(d) (2) Members of courts-martial shall be selected at random from all eligible members of the armed forces under regulations prescribed by the Secretary concerned. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(e) Before a court-martial is assembled for the trial of a case, the convening authority, for good cause, may excuse a member of the court from participating in the case....

APPENDIX B

REVISION OF ARTICLE 41

841. Art. 41. Challenges

...

(b) Each accused is entitled to two peremptory challenges. The trial counsel is entitled to one peremptory challenge, but the military judge may not be challenged except for cause.

FOOTNOTES

1. L. Moore, The Jury-Tool of Kings, Palladium of Liberty v (1973).
2. Id.
3. U.S. Const. art. I, section 8.
4. U.S. Const. art. II, section 2.
5. U.S. Const. amend. V.
6. 10 U.S.C. sections 801-940 (1982) [hereinafter cited as UCMJ].
7. UCMJ art. 25(d)(2).
8. Id.
9. Duncan v. Louisiana, 391 U.S. 145 (1968).
10. Baldwin v. New York, 399 U.S. 66 (1970).
11. W. Jordan, Jury Selection 1 (1980).
12. Hoyt v. Florida, 368 U.S. 57 (1961); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).
13. Smith v. Texas, 311 U.S. 128 (1940).
14. Standards on The Administration of Criminal Justice: Trial by Jury section 2.1 (2d Ed. Approved Draft, 1978).
15. Id., commentary at 48.
16. 419 U.S. 522, 530 (1975).
17. Standards Relating to Juror Use and Management Standard 3 commentary at 36 (1983).
18. See e.g. O'Callahan v. Parker, 395 U.S. 258 (1969); Ex Parte Quirin, 317 U.S. 1 (1950);Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
19. United States v. Culp, 14 C.M.A. 199, 33 C.M.R. 411 (1964).
20. United States v. Crawford, 15 C.M.A. 31, 35 C.M.R. 3 (1964).

21. H. Moyer, Justice and the Military 524 (1972).
22. Id.
23. Id.
24. Brief for the United States at 7, United States v. Solorio, 21 M.J. 251 (1986), cert. granted, __ U.S.L.W. __ (U.S. Jun. 16, 1986)(No. 85-1581).
25. Mutiny Act, 1 W. & M., c. 5 preamble (1689).
26. W. Winthrop, Military Law and Precedents 19 (1920 reprint).
27. J. Bishop, Justice Under Fire 6,7 (1974).
28. Id. at 6,8.
29. Stuart-Smith, Military Law: Its History, Administration and Practice, Mil. L. Rev. Bicent. Issue 26 (1975).
30. Winthrop, supra note 26, at 20.
31. Id.
32. Mutiny Act, preamble.
33. Winthrop, supra note 26, at 20; Bishop, supra note 27, at 8.
34. Id., at 21,22. see also Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 Harv. L. Rev. 293 (1957).
35. Winthrop, supra note 26, at 22,23; Henderson, supra note 34, at 297.
36. The Federalist No. 41 (J. Madison). The discussion of standing armies is not confined to number 41, but crops up in numbers 11, 25, 26, and 28. see also The Federalist Editor's Introduction, at 18,19 (B. Wright ed. 1961).
37. Id.

38. The foremost case in the post-civil war period on military in personam jurisdiction is Milligan.
39. Act of March 3, 1863, section 30, Rev. Stat. section 1324, Article 58 (1875).
40. Winthrop, supra note 26, at 990.
41. Id.
42. Id.
43. Id., at 691.
44. For a thumbnail sketch of the status test, which sets out that personal jurisdiction is purely a question of an individual's lawful presence in the military, see Moyer, supra note 21, at 24.
45. 395 U.S. 258.
46. 368 U.S. 234,241 (1960).
47. Government Printing Office, The Army Lawyer: A History of the Judge Advocate General's Corps 1775-1975, 108-110 (1975).
48. Id., at 109.
49. Articles of War, 1916, Article 92.
50. Duke and Vogel, The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction, 13 Vand. L. Rev. 435,452 (1960).
51. The Army Lawyer: A History, at 109.
52. Id., at 113-115,128,129. Ansell had been appointed Acting Judge Advocate General during the war because Crowder was directing the Selective Service System in his role as Provost Marshall General, a post he held concurrently with his JAGD duties.
53. Id., at 137.
54. W. Generous, Swords and Scales 10 (1973).

55. Id., at 6.
56. The Army Lawyer: A History, supra note 47, at 115. See also Brown, The Crowder- Ansell Dispute: The Emergence of General Samuel T. Ansell, 35 Mil. L. Rev. 1 (1967).
57. Id.
58. Id.
59. The Judge Advocate General's School U.S. Army, The Background of the Uniform Code of Military Justice 10 (undated).
60. Sherman, The Civilianization of Military Law, 22 Maine L. Rev. 3, 44-49 (1970).
61. Id., at 39.
62. Duke and Vogel, supra note 42, at 453.
63. Sherman, supra note 60, at 39.
64. Langley, Military Justice and the Constitution- Improvements Offered by the New Uniform Code of Military Justice, 29 Texas L. Rev. 651 (1951).
65. 395 U.S. 258.
66. Moyer, supra note 21, at 24.
67. O'Callahan, 395 U.S. at 267. see also Gosa v. Mayden, 413 U.S. 665 (1973).
68. 401 U.S. 355 (1971).
69. 361 U.S. 234, 243.
70. Pub. L. No. 90-632, 82 Stat. 1335.
71. Solorio brief, supra note 24, at 47.
72. 9 M.J. 337 (C.M.A. 1980).
73. Id., at 350.
74. 21 M.J. 251, 255, 256 (C.M.A. 1986).
75. United States v. Stover, SPCM 21611 (A.C.M.R. 26 Feb. 1986).
76. See United States v. Scott, 21 M.J. 345 (C.M.A. 1986).

77. Executive Order No. 12198, 3 CFR 151 (1980).
78. Manual for Courts-Martial, United States, 1984, app. 22, at A22-42 [hereinafter cited as MCM, 1984].
79. Pub. L. No. 98-209, 97 Stat. 1393.
80. Id.
81. MCM, 1984 app. 21, RCM 203 at A21-10.
82. Id.
83. These included control of the judiciary by the convening authority, substantially different rules of evidence and procedure, pervasive command influence despite attempts to control it, and trial by handpicked members of the military rather than trial by a jury of one's peers. 395 U.S. 258.
84. The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1969). see also MCM, 1984; MCM, 1969; U.C.M.J. art 26; Army JAGC Personnel Policies, para. 8-1, Selection of Military Judges (1985-1986).
85. S. Saltzburg, L. Schinasi and D. Schlueter, Military Rules of Evidence Manual 1,5 (1981); MCM, 1984, app. 22, at A22-56.
86. MCM, 1984, app. 21 at A21-10. The comment to Rule 203 makes the drafter's intent quite plain: "This rule is intended to provide for the maximum possible court-martial jurisdiction over offenses."
87. 350 U.S. 11 (1955).
88. Ansell, Military Justice, 5 Cornell L. Q., as reprinted in Mil. L. Rev. Bicent. Issue 53 (1975).
89. Id.

90. Id., at 55.
91. 1 C.M.A. 74, 1 C.M.R. 74 (1951).
92. Id., at 77.
93. Willis, The Constitution, The United States Court of Military Appeals and the Future, 57 Mil. L. Rev. 27,30 (1972).
94. 3 C.M.A. 220, 11 C.M.R. 220 (1953).
95. 11 C.M.A. 428, 29 C.M.R. 244, 246 (1960). See also Burns v. Wilson, 346 U.S. 137 (1953).
96. U.S. Const., Amend. V.
97. 16 C.M.A. 629, 37 C.M.R. 249 (1967).
98. 384 U.S. 436 (1966).
99. 37 C.M.R. 249, at 253.
100. Quinn, The United States Court of Military Appeals and Military Due Process, 35 St. John's L. Rev. 231, 232 (1961).
101. 346 U.S. 137 (1953). See also Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 188 (1962).
102. Note, Constitutional Rights of Servicemen Before Courts-Martial. 64 Colum. L. Rev. 127,130 (1964).
103. MCM, 1984, at A2-22.
104. Quinn, supra note 100, at 241.
105. U.S. Const. amend. V.
106. Jacoby, at 246.
107. Constitutional Rights of Servicemen, supra note 91.
108. O'Callahan, 395 U.S. 258.
109. Solorio, 21 M.J. at 256.
110. See, e.g., Cooper, The Sixth Amendment and Military Criminal Law: Constitutional Protections and Beyond, 84 Mil. L. Rev. 41, 52, 53 (1979); cases supra, note 11.

111. Wiener, Courts-Martial and the Bill of Rights: The Original Practice, 72 Harv. L. Rev. (1958).

112. United States v. McClain, 22 M.J. 124, 128 (C.M.A. 1986); United States v. Kemp, 22 C.M.A. 152, 46 C.M.R. 152 (1973).

113. Crawford, 35 C.M.R. at 6.

114. United States v. Daigle, 1 M.J. 139 (C.M.A. 1975).

115. United States v. Delp, 11 M.J. 836 (C.M.A. 1981).

116. United States v. McCarthy, 2 M.J. 26, 29 n. 3 (C.M.A. 1976).

117. Id.

118. United States v. Yager, 7 M.J. 171 (C.M.A. 1979).

119. Id., at 172.

120. 425 U.S. 223 (1978).

121. 5 M.J. 832 (A.C.M.R. 1978).

122. United States v. Lamela, 6 M.J. 11, 32(C.M.A. 1978)

123. Kemp, 45 C.M.R. at 155; Yager, 7 M.J. at 171-173 and United States v. Yager, 2 M.J. 484 (A.C.M.R. 1975). The dissent by Judge Felder is notable for its treatment of alienage as a suspect classification in panel selection. The Court of Military Appeals delicately sidestepped the issue in note 5 of the decision above.

124. Kemp, 45 C.M.R. 152.

125. Id., at 156.

126. See Brookshire, Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction, 58 Mil. L. Rev. 71, 94 (1972) for a complete discussion of the need for statutory

reform. The author concludes that Article 25 need not be rewritten in order to accommodate a random selection system.

127. Id.

128. Bishop, supra note 27, at 28,29.

129. United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986). In this decision, the culmination of the Third Armored Division cases, Chief Judge Everett directly warns commanders and SJA's that in any future cases of command influence the court "will find it necessary to consider much more drastic remedies." Id. at 393. This is a remarkable statement, coming from a court which has almost singlemindedly discarded the paternalistic concerns of its forebears.

130. 11 C.M.A. 642, 29 C.M.R. 458 (1960).

131. Id., at 461.

132. Schewender, One Potato, Two Potato...: A Method to Select Court Members, The Army Lawyer, May 1984, at 15.

133. UCMJ art. 41.

134. MCM, 1984, at A21-54.

135. Greene, 43 C.M.R. at 78.

136. Id.

137. Daigle, 1 M.J. at 140.

138. Id., at 141.

139. 20 M.J. 912 (A.C.M.R. 1985).

140. Field grade ranks include Major, Lieutenant Colonel, and Colonel.

141. Captains and Lieutenants.

142. Autrey, 20 M.J. at 913. This case contains a detailed review of improper command influence in panel selection cases.

143. Id., at 917.
144. McClain, 22 M.J. at 126, 127.
145. Id.
146. Id., at 132.
147. Id., at 133.
148. UCMJ art. 37.
149. Moyer, supra note 21, at 779, 780.
150. UCMJ art. 98; Sherman, Congressional Proposals for Reform of Military Law, 10 Am. Crim. L. Rev. 25, 40, 41 (1971); Gaydos and Warren, What Commanders Need to Know About Unlawful Command Control, The Army Lawyer, Oct. 1986, at 9, 10.
151. Sherman, supra note 150, at 40. See Moyer, supra note 21, at 721-725.
152. See, e.g., Autrey, McClain, and Greene.
153. Bayh, The Military Justice Act of 1971: The Need for Legislative Reform, 10 Am. Crim. L. Rev. 9,10 (1971).
154. Sherman, Civilianization, supra note 60, at 97.
155. United States v. Accordino, 20 M.J. 102 (C.M.A. 1985).
156. Thomas, 22 M.J. at 393.
157. Quinn, supra note 100, at 242.
158. Ansell, supra note 88, at 53, 54.
159. Id., at 53.
160. Westmoreland, Military Justice- A Commander's Viewpoint, 10 Am. Crim. L. Rev. 5,8 (1971).
161. John 12:8.
162. Taylor v. Louisiana, 419 U.S. 522 (1975).

163. The Judge Advocate General's School Library, 1 Legislative History of the Military Justice Act of 1983 278 (1983) (available in the TJAGSA Library).

164. S. 2183, 92d Cong.,1st Sess. section 821 (1971).

165. Remcho, Military Juries: Constitutional Analysis and the Need for Reform, 47 Ind. L. J. 193, 223, 224 (1972).

166. The edited text of Professor Bishop's speech is published at 62 Mil. L. Rev. 215 (1973).

167. Id., at 216-220.

168. Bayh, supra note 153, at 9.

169. Id., at 19.

170. Id., at 20.

171. Id.

172. S. 2183, 92d Cong., 1st Sess., section 821 (1971).

173. Remcho, supra note 165, at 226.

174. Id., at 226,227.

175. S. 2183.

176. Remcho, supra note 165, at 228, 229.

177. The Army Lawyer, A History, at 133.

178. Id.

179. Id.

180. Id.

181. Hodson, The Manual for Courts-Martial -1984, 57 Mil. L. Rev. 1 (1972). The title is disquietingly prescient.

182. Id., at 10.

183. Id.

184. Id.

185. Id., at 7.

186. Brookshire, supra note 126, at 96.
187. Id., at 97, 98.
188. Id., at 99.
189. Id., at 103,104.
190. Yager, 7 M.J. at 171.
191. Id.
192. Id.
193. Id.
194. Letter from Colonel Hubert G. Miller to Major General Kenneth J. Hodson, 4 Feb. 1971, copy on file in the TJAGSA Library.
195. Id., Incl. 1.
196. Brookshire, supra note 126, at 98, n. 2.
197. Letter, supra note 194.
198. Id.
199. Id.
200. Id.
201. Id.
202. Id.
203. Legislative History, supra note 163, at 99, 100.
204. Id., at 266, 267.
205. Id., at 269, 270.
206. Lonergan, An Overview of the Military Justice Act of 1983 Advisory Commission Report, The Army Lawyer, May 1985, at 42.
207. Legislative History, supra note 163, at 57-59.
208. Id., at 120.
209. Id., at 118, 119.
210. Id., at 119.
211. Sherman, Civilianization, supra note 60, at 103.

212. Moyer, Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant, 22 Maine L. Rev. 105, 110 (1970).

213. V. Varner, Notes for the Course in the History of the Military Art 2-5 (1975).

214. UCMJ art. 29.